

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1123 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA.

- =====
1. Whether Reporters of Local Papers may be allowed
to see the judgements? Yes
 2. To be referred to the Reporter or not? Yes
 3. Whether Their Lordships wish to see the fair copy
of the judgement?
 4. Whether this case involves a substantial question
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?
3 to 5 No

PRAVINBHAI BHAILALBHAI GOR

Versus

RAJIVKUMAR GUPTA

Appearance:

MR BS PATEL for Petitioner
MR UA TRIVEDI AGP for Respondent No. 1

CORAM : MR.JUSTICE R.BALIA.

Date of decision: 01/09/98

ORAL JUDGEMENT

1. The present petition challenges Notice dated 29th November, 1997 purported to have been issued under Rule 108 (6) of the Gujarat Land Revenue Rules, by which it sought to cancel the mutation entry made in favour of Dr.

Pravinbhai Bhailalbai Gor on 28th March, 1986, which was affirmed in the further proceedings on 11th March, 1992 on the ground that such transfer has taken place without permission of competent officer and in violation of Sec. 43 and also because the petitioner is non-agriculturist, such entry was made in violation of Section 63 of the Bombay Tenancy Act. The facts which led to issuance of this notice are that the land originally stood in the name of Mohanbhai, who executed a will in favour of present petitioner on 15.2.1986. On 18.10.87 Mohanbhai expired and the petitioner claimed mutation entry in his favour on the basis of the said will. After holding an inquiry on application of the petitioner for such mutation, entry No. 1085 was made in the record of right in favour of the petitioner on 28th March, 1989. It was certified on 7th April, 1989. Proceedings were initiated against the petitioner for alleged breach of Section 63 of the Bombay Tenancy Act by Addl. Mamlatdar & ALT and the same was dropped. Now, the said entry made in favour of the petitioner is again sought to be cancelled by initiating the proceedings through aforesaid notice by treating the mutation entry made in his favour on the basis of a Will to be in breach of provisions of Sections 43 and 63.

2. Heard learned counsel for the petitioner as well as learned AGP. The only question that arises for consideration in this case is whether the transmission of property to a person as a successor of the deceased tenant attracts the provision of Section 43 or Section 63.

3. Relevant provision Section 43 of the Bombay Tenancy Act reads as under.

43(1) No land or any interest therein purchased
by a tenant under sections 17B, 32, 32F,
32I, 32O (32U, 431D or 88E) or sold to
any person under section 32P or 64 shall
be transferred or shall be agreed by an
instrument in writing to be transferred,
by sale, gift, exchange, mortgage, lease
or assignment, without the previous
sanction of the Collector and except in
consideration of payment of such amount
as the State Government may by general or

special order determine; and no such land or any interest, therein shall be partitioned without the previous sanction of the Collector.

43(2) Any transfer or partition, or any agreement of transfer, or any land or any interest therein in contravention of sub-section (1) shall be invalid.

Likewise relevant provisions of Section 63 of the Act reads as under :

63. Transfers to non-agriculturist barred : (1)

Save as provided in this Act, -

- (a) no sale (including sales in execution of a decree of a Civil Court or for recovery of arrears of land revenue or for sums recoverable as arrears of land revenue, gift, exchange or lease of any land or interest therein, or
- (b) no mortgage of any land or interest therein, in which the possession of the mortgaged property is delivered to the mortgagee,
- (c) no agreement made by an instrument in writing for the sale, gift, exchange, lease or mortgage of any land or interest therein, shall be valid in favour of a person who is not an agriculturist or who being an agriculturist cultivates personally land not less than the ceiling area whether as an owner or tenant or partly as owner and partly as tenant or who is not an agricultural labourer;

Provided that the Collector or an officer authorised by the State Government in this behalf may grant permission for such sale, gift, exchange, lease or mortgage, or for such agreement on such conditions as may be prescribed;

Provided further that no such permission shall be granted, where land is being sold to a person who is not an agriculturist for agricultural purpose, if the annual income of such person from other sources exceed five

thousand rupees.

(2) Nothing in this section shall be deemed to prohibit the sale, gift, exchange or lease, or the agreement for the sale, gift, exchange, or lease of a dwelling house or the site thereof or any land appurtenant to it in favour of an agricultural labourer or an artisan or a person carrying on any allied pursuit.

(3) Nothing in this section shall apply or be deemed to have applied to a mortgage of any land or interest therein effected in favour of a cooperative society as security for the loan advanced by such society or any transfer declared to be a mortgage by a court under section 24 of the Bombay Agricultural Debtors' Relief Act, 1947.

(4) Nothing in section 63A shall apply to any sale made under sub-section (1).

4. Section 43 provides that no land or any interest therein shall be transferred or shall be agreed by an instrument in writing to be transferred, by sale, gift, exchange, mortgage, lease or assignment, without the previous sanction of the Collector and except in consideration of payment of such amount as the State Government may by general or special order determine; and no such land or any interest, therein shall be partitioned without the previous sanction of the Collector. Sub-section (2) of Section 43 declares any transfer or partition or any agreement of transfer of any land or any interest therein in contravention of sub-section (1) to be invalid.

5. Likewise Section 63 restricts sale, gift, exchange or lease of any land or interest therein or mortgage of any land or interest therein, in which the possession of the mortgaged property is delivered to the mortgagee or any agreement made by an instrument in writing for the sale, gift, exchange, lease or mortgage of any land or interest therein shall not be valid in favour a person who is not an agriculturist except with the permission of the Collector or an officer authorised by the State Government in this behalf. Perusal of both the provisions, clearly go to show that it refers to only to transaction or transfer or agreement to transfer of land or any interest therein which are inter vivos and not to vesting of such rights in any one as a result of

transmission or as a result of succession on death of holder. The provision do not affect the operation of law of inheritance. Learned counsel for the parties are in agreement that Tenancy Act does not provides any separate rule of inheritance to the estate of the deceased tenant, other wise then the personal law governing the estate of the deceased. The deceased, in the present case, was a Hindu and his estate would be governed by the Hindu Succession Act as he died on 18.10.1987. Section 4 of the Hindu Succession Act gives the overriding effect to the provision of the Hindu Succession Act in the matter of succession. In Clause (b) sub-section (1) of Section - 4 it is declared that any other law in force immediately before the commencement of this Act shall cease to apply to Hindus insofar as it is inconsistent with any of the provisions contained in this Act. In sub-section (2) it saves the operation of laws relating to prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings. As the present case does not relate to prevention of fragmentation of agricultural holdings or fixation of ceilings and there is no special provision under the tenancy laws providing to devolution of tenancy rights of deceased tenant, the provisions of the Hindu Succession Act would govern. Section-30 of the Hindu Succession Act acknowledges testamentary succession as a mode of succession on death of a Hindu male or female including that of undivided interest in coparcenary property of a male Hindu. Thus, testamentary succession is a permissible mode of succession in case of a death of a tenant who is Hindu. A will is not an instrument of transfer of property by Sale, gift, exchange or mortgage or lease or assignment nor it is an agreement. It needs two living persons to make an agreement. It is the unilateral declaration of a person fixing his own line of succession to his estate on his demise. The will speaks as on the death of the testator and the succession takes place in accordance with the directions in the will. It is devolution of interest of deceased by succession in the nominated persons and not transfer of interest of a person in any of the modes of transfer prescribed, which all relate to transfer inter vivos. The will is not a document of transfer by way of sale, gift, exchange, mortgage, lease or assignment. It is instrument changing the course of devolution of interest by way of inheritance which even otherwise would have taken where the holder had died without a will, by way of intestate succession. The inheritance in the case of intestate succession would have been as declared in the Act. Neither Section 43 nor Section 63 envisage prior

permission of any authority for executing a will that would take effect after the death of a person which he has right to vary, cancel or modify anytime before his death, as many times as the testator desires. Thus, the very premise on the basis of which the learned Collector, Vadodara, had issued Notice dated 29.11.1997 is on the face of it contrary to law and cannot be sustained. No other ground for initiating proceedings has been shown in the notice to show cause or urged.

6. Even otherwise, the Collector is seeking to initiate proceedings under Rule 108 (6) after about 9 years when the entry was first recorded and certified. In the circumstances it appears that the power has not been exercised within the reasonable period also.

7. The petition therefore succeeds. The Notice dated 29.11.1997 - Annexure 'A' is quashed. There shall be no order as to costs.

p.n.nair